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Supreme Court of the United States

OCTOBER TERM, 1993

IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, DR. MOHAN JAIN, and JOSIP VRESK,

Petitioners,

v.

ARGONNE NATIONAL LABORATORY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether naturalized American citizens and permanent residents ("Immigrant Americans") must meet higher degree of proof, under more exacting rules of law than other Americans to show racial and ethnicity discrimination under 42 USC §1981 and Title VII.

Whether Immigrant Americans were denied their right of jury trial and equal protection of law in employment discrimination case, when the court of appeals held that, (1) the private employer is not liable for direct evidence of racial, ethnic, and retaliatory animus of its supervisors, (2) despite direct evidence of discriminatory motivation by decision-making supervisors, the *McDonnell Douglas* burden shifting method applies, rather than the *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, and *TWA v. Thurston*, 469 U.S. 111, burden-shifting framework, (3) employers can deny employees their contract right to in-house grievance procedure on the ground that employees filed discrimination charges with EEOC, (4) promotion from worker to supervisor does not meet the "new and distinct relationship" standard for §1981 claim under *Patterson*, (5) inferences can be drawn in favor of employer, and employee evidence need not be believed in ruling on employer's motion for directed jury verdict, and that (6) racially motivated retaliation because employees attempted to enforce their contract rights is not a claim cognizable under 42 USC §1981.

Whether the Civil Rights Act of 1991 should be applied to pending cases, and whether appellate court erred in awarding employer costs on appeal after the 1991 Civil Rights Act became effective, and after employees proved

racial, ethnic, and retaliatory motivation in making adverse decisions about employees.

Whether dismissal of Title VII claims was against the weight of evidence, and improper before jury verdict on §1981 claims.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Ivan Von Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Mohan Jain, and Josip Vresk, respectfully request that a Writ of Certiorari issue to review the opinions of the Seventh Circuit Court of Appeals and the United States District Court for the Northern District of Illinois, Eastern Division, issued in the above-entitled proceedings.

OPINIONS BELOW

The January 29, 1993 Opinion of the Seventh Circuit Court of Appeals, Von Zuckerstein, et al. v. Argonne National Laboratory, No. 91-2490 published as 984 F.2d 1467 (7th Cir. 1993), March 26, 1991 Opinion of the District Court for the Northern District of Illinois, Eastern Division, Case No. 86 C 6304, published as 760 F. Supp. 1310 (N.D. Ill. 1991) and the unpublished April 24, 1991 and May 31, 1991 Opinions of the District Court for the Northern District of Illinois, Eastern Division printed in the Appendix hereto.

JURISDICTION

The Opinion of the United States Court of Appeals for the Seventh Circuit in this matter was entered on January 29, 1993, and rehearing was denied on April 7, 1993. The time to file Petition for the Writ of Certiorari was extended to September 4, 1993 by Order of the U.S. Supreme Court dated June 22, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254.

RELEVANT STATUTES

The pertinent sections of 42 U.S.C. Secs. 1981, 2000e-2, 2000e-3, and 2000e-5(g)(2)(B) are set forth in the Appendix at pp. 72-73.

STATEMENT OF THE CASE

Throughout the 20th Century, immigrant scientists and engineers made major contributions to the advancement of American science and technology, e.g. Einstein, Von Braun, Fermi, Teller. The current shortage of adequately trained native-born engineers and scientists makes the presence of immigrants indispensable for the functioning of the nation's industrial system. The principal issue in this litigation is whether immigrants of different race and ethnicity must remain mere providers of technical knowledge and skills, or whether they can compete with other Americans for advancement into management.

Petitioners complain that they were denied advancement into supervisory positions because of their race and ethnicity in violation of Section 1981 and Title VII. Every claim in this litigation is tied to the denial of promotion from worker to supervisor, and to actions taken by petitioners' supervisors because petitioners sought supervisory positions, or because petitioners complained internally, to the EEOC and to the court about the denial of supervisory promotions. The "Glass Ceiling" because of petitioners' race and ethnicity is thus the focal point of this litigation.

Petitioners complain that the trigger point for adverse employment decisions about them was the petitioners' extraordinary work accomplishments, exceptional outside recognition, or the creation of new research programs that normally lead to promotion into management. (Award of its highest scientific honor by AICHE to Ramaswami, public exhibit of Von Zuckerstein's work by the U.S. Government, creation of new research programs by Jain, Chang and Von Zuckerstein.)

Defendant Argonne National Laboratory ("Argonne") is a private employer operated by a private university, the

University of Chicago. Argonne employees are employees of the University of Chicago. The U.S. Government and its agencies, departments, etc. have no liability whatsoever in this litigation.

Petitioners Ramaswami and Jain are brown-skinned Indian-Americans, Chang is a yellow-skinned Chinese-American, Von Zuckerstein is a German-American, and Vresk is a Croat-American. All have lived in the U.S. more than 20 years. Jain, Chang, Ramaswami and Von Zuckerstein worked in the Energy and Environmental Systems Division ("EES"), and Vresk worked in the Plant Facilities and Services Division ("PFS").

DENIAL OF STANDARDS FOR DIRECT EVIDENCE OF DISCRIMINATION

Petitioners in this litigation have shown by direct, undisputed evidence that their Argonne supervisors made adverse employment decisions about petitioners on the basis of petitioners' race, ethnicity, and because petitioners filed EEOC charges and the instant lawsuit. The direct evidence includes, but is not limited, to the following:

(1) In a 1983 management meeting attended by director Sather, director Bernard and supervisor Faddis, director Sather or Bernard stated that Jain cannot be a program manager of his program because "the sponsor didn't want an *Indian in charge* of the program." In 1984, Sather denied Jain's application for a supervisory position in a research program that Jain conceived and developed jointly with another Immigrant-American, John Bratis. In 1985, Sather denied Ramaswami's applications for three advertised position on the ground that said positions were supervisory.

(2) Director Sather directed Argonne managers under him that "Chinese Types" are not to be hired. Chang ap-

plied for 9 advertised positions under Sather in Chang's recognized area of expertise. Chang was not hired. Chang was laid off after he complained to Sather about removal from supervisory position in Chang's program. Sather denied applications for hire of other qualified Asian-Americans (Jain 4, Ramaswami 3).

(3) Director Bernard advised the U.S. Government that Von Zuckerstein will not be rehired at Argonne because he is suing Argonne for discrimination. Von Zuckerstein applied for 50 advertised positions, but was not rehired. One of these 50 positions was an apprentice position in district heating under Bernard (Assistant Economist). The achievements of Von Zuckerstein's prior work in district heating were the topic of a U.S. Government public exhibit in Washington, D.C. Bernard denied Von Zuckerstein's application for the job of an apprentice in district heating. None of the petitioners in this lawsuit were rehired for work in their area of expertise after they applied for advertised positions at Argonne (Chang 9, Jain 4, Ramaswami 4, Von Zuckerstein 50).

(4) Processing of Ramaswami's routine layoff extension was interrupted at the very instant Argonne managers learned that Ramaswami filed an EEOC discrimination charge. This resulted in an immediate termination of Argonne employment for Ramaswami.

(5) Argonne denied Ramaswami, Jain and Von Zuckerstein their contract right to an in-house discrimination complaint procedure for the sole reason that they filed EEOC discrimination charges. This left the entire burden to the EEOC and the federal courts. Argonne further denied petitioners their contract right to have their discrimination complain investigated, and refused to collect any data on representation of Immigrant-Americans in management, to investigate petitioners' complaints of statistical-

ly significant underutilization of immigrants in Argonne's management.

(6) Supervisor Meshenberg conducted a study of Von Zuckerstein's ethnicity and determined it to be German. Meshenberg testified that there is an animosity between the Jews and the Germans. Meshenberg is Jewish. Von Zuckerstein was laid off because Meshenberg rated him the lowest in various sub-areas of economics. Meshenberg has no background in economics, and he testified that he never supervised any of Von Zuckerstein's work in economics. Meshenberg also wrote various undated, unsigned and untrue damaging documents that he secretly placed in Von Zuckerstein's personnel file. After Von Zuckerstein complained of discrimination, Meshenberg lowered his performance evaluation from "Good" to "Unsatisfactory".

(7) In May of 1984, all white, native born project managers were placed into a newly formed project management group and continued to function as supervisors. All immigrant project managers including petitioner Vresk and three non-white immigrants were summarily demoted to non-supervisory positions. Vresk repeatedly requested to be placed into the project management group but his requests were denied. Vresk's management duties were given to less qualified, white, native born employees. Vresk was better qualified than all the native born employees in the project management group.

(8) Argonne documents showed that before Ramaswami and Jain were hired, Argonne managers had to request an exemption from Argonne policy giving preference to native-born employees.

(9) All supervisors under director Bernard were white, native born. Director Bernard admitted in his testimony that he did not consider non-white immigrants for supervisory promotions.

The appellate court acknowledged that Argonne supervisors were motivated by racial animus when making adverse employment decisions about petitioners. The court held:

> "While the petitioners may have offered evidence of racial animus on the part of supervisors at Argonne, none has offered any direct evidence of discriminatory intent on the part of Argonne."

The court held that petitioners are not entitled to the standards for direct evidence of discrimination under *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed. 2d 523 (1985) and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, 104 L.Ed. 2d 268, 109 S.Ct. 1775 (1989) and must prove discrimination by indirect evidence under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) standard. In the *McDonnell* analysis, the court then eliminated from consideration all direct evidence of racial, ethnic and retaliatory motivation of Argonne supervisors as it pertained to review of jury issues and the lower court ruling granting Argonne motion for directed jury verdict.

For instance, the court held that Ramaswami produced no direct evidence of discrimination against Indians in support of his claim that director Sather denied him promotion to supervisory positions of senior engineer. Contrary to the court's holding, Ramaswami produced direct evidence that Sather demoted Jain because "the sponsor did not want an Indian in charge of the program", and that Sather directed that "Chinese Types" are not to be hired.

Similarly, the court, in analyzing Von Zuckerstein's claim of failure to rehire for 50 positions, excluded direct evidence that director Bernard stated to the U.S. Government that Von Zuckerstein will not be rehired because he is suing Argonne for discrimination.

The court also makes no mention of the other direct evidence of discrimination in its analysis of Section 1981 jury issues and review of the motion for directed verdict. Based on *McDonnell Douglas* analysis of only the indirect evidence, the court upheld the direction of the verdict on all issues.

DENIAL OF IN-HOUSE GRIEVANCE PROCEDURE

Evidence showed that Argonne denied Ramaswami, Jain and Von Zuckerstein their contract right to have their discrimination complaints thoroughly investigated and aired in an in-house grievance procedure. Argonne's denial was on the grounds that petitioners filed EEOC discrimination charges. EEOC issued a determination that Argonne unlawfully retaliated against Jain and Ramaswami. Evidence showed that Argonne never collected any data to make any investigation of underutilization of immigrants as charged, not for the EEOC, and not on its own. Jain and Von Zuckerstein made another complaint unrelated to discrimination in another Argonne procedure called "Equity Review". Argonne completed the "Equity Review" of these non-discrimination issues and notified Jain and Von Zuckerstein of its results.

The appellate court held that petitioners were not prejudiced when Argonne denied them the in-house discrimination procedure because Argonne communicated its answer to the discrimination charges to the EEOC. The court drew an inference that Argonne made the same investigation to formulate its answer to the EEOC charges as was required in internal grievance procedures. The court held further that Argonne investigation of complaints unrelated to discrimination in the "Equity Review" relieved Argonne of its obligation to give Jain and Von Zuckerstein the in-house grievance procedure for discrimination complaints.

SUPERVISORY POSITION AS A "NEW AND DISTINCT RELATIONSHIP"

Vresk, Ramaswami, Jain and Von Zuckerstein were each denied a promotion from worker to supervisor for which they applied. Vresk was denied the position of project manager in the project management section, Ramaswami was rejected by Sather for several supervisory positions as a senior engineer and a manager, Jain was rejected by Sather for the position of principal investigator, and Von Zuckerstein was denied promotion to manager of the district heating program. In each instance, the jobs were given to less qualified, white, native-born employees (Vachta, Bartusek, Schertz, Lazar and Kennedy).

The appellate court held that Vresk's and Ramaswami's promotion from worker to supervisor do not meet the "new and distinct relationship" test under *Patterson v. McLean Credit Union*, 491 U.S. 164, 181, 109 S.Ct. 2363, 2375, 105 L.Ed. 2d 132 (1989), and therefore do not state a Section 1981 claim. The court also held that denial of Jain's promotion to principal investigator does not constitute a failure to promote. The court did not address the denial of Von Zuckerstein's promotion to manager of the district heating program at all. The court also did not address the question whether Vresk proved his Title VII claim by undisputed evidence that he was denied a supervisory promotion for which he applied, and that the job was given to a less qualified, native-born employee.

INFERENCES IN FAVOR OF MOVANT IN DIRECTING A JURY VERDICT

In upholding the direction of the jury verdict, the appellate court resolved conflicts in the evidence in favor of the movant, drew inferences from the facts in favor of the movant and against the non-movant, and did not give any weight to the bulk of petitioners' undisputed evidence of racial, ethnic and retaliatory motivation.

For instance, the court gave no weight to the direct evidence of discrimination outlined in (1) through (9) above.

The court held that Ramaswami failed to show that Argonne's reasons for denying Ramaswami promotion to three senior positions were pretextual. Argonne claimed that Ramaswami lacked qualifications for said positions in the EES Division.

EES Division Director Croke testified that number of publications and outside scientific recognition were the criteria for promotion to a senior engineer. The Argonne personnel manual showed that patents are also required. Undisputed evidence showed that Ramaswami exceeded the relevant qualifications of all senior engineers in the EES Division as shown below.

A. BROWN SKIN

NAME	# PUBLICATIONS	# PATENTS	OUTSIDE SCIENTIFIC RECOGNITION
RAMASWAMI	93	5	Elected Fellow of AICHE

B. WHITE SKIN

NAME	# PUBLICATIONS	# PATENTS	OUTSIDE SCIENTIFIC RECOGNITION
CROKE	4 or 5	1 or 2	NONE
SCHERTZ	20 to 87	5	NONE
SATHER	20 to 87	5	NONE

The evidence shows that Ramaswami met or exceeded the comparable qualifications of white employees who were promoted, and that Argonne contentions of lack of qualifications for the positions are pretextual. Ramaswami's immediate supervisors Timm and Chopra testified that they each recommended Ramaswami for promotion to senior engineer. Evidence showed that the promotions are initiated

by the immediate supervisors, not the senior personnel in his division that the court held relevant.

Evidence shows that each petitioner in the EES Division was laid off at the time they were to be promoted into supervisory positions. Ramaswami was laid off in September of 1985, several months after he was elected a "Fellow" of AICHE, which gave him the highest outside scientific recognition of any employee in the EES Division. Director Lewis wrote that Ramaswami was laid off as "the least valuable of our personnel". Except for Ramaswami, no "Fellow" in a scientific society was ever laid off from Argonne. Undisputed evidence shows that Ramaswami was the best qualified employee of EES. All EES managers are white, native-born.

Jain was laid off within months of his application for a supervisory position of a principal investigator in the research program that Jain conceived and developed with John Bratis. Jain's supervisor testified that Jain was absolutely qualified for said promotion, and that Lazar was less qualified. Lazar is white, native born. Lazar was given the principal investigator position and Jain was laid off.

In November of 1982, director Kuczen asked that Von Zuckerstein be promoted to manager of the district heating program. Within weeks after that, Meshenberg went to the Argonne Personnel Department to see if Von Zuckerstein could be fired. Meshenberg admitted that the decision to lay off Von Zuckerstein was made at that time, months before the complex layoff selection and multiple evaluation process took place. Meshenberg also admitted that he had no knowledge of Von Zuckerstein's work and that he therefore relied on input from A. Kennedy, who competed with Von Zuckerstein for the job of manager of the district heating program. A. Kennedy has no quali-

fications in district heating but he was given the job. A. Kennedy is white, native born.

Chang was laid off after he protested his removal as manager of the biomass program by Sather. The job was given to R. Niemann. Niemann testified that he did not have any qualifications in biomass, and admitted that Chang had excellent qualifications in biomass. Niemann is white, native born.

Evidence shows that Jain and Von Zuckerstein were removed from charge of new research projects that they themselves created, developed and secured funding for from the U.S. Government (Jain - $500,000-ORC project, Von Zuckerstein - $600,000-RCS program).

Argonne did not produce any evidence that any white, native born employee was ever removed from charge of a program he or she developed.

The appellate court held that Von Zuckerstein did not identify any specific position of the 50 positions for which he applied, and that he was not qualified for the positions identified for him by Bernard. Evidence shows that Von Zuckerstein applied for the job of an apprentice in district heating, the job he held before his layoff (Assistant Economist). The U.S. Government (DOE) exhibited the results of Von Zuckerstein's work in district heating in a public exhibit in Washington, D.C. as a notable scientific achievement (the first application of a new district heating technology in America). Director Kuczen asked that Von Zuckerstein be promoted to manager of the district heating program. The court accepted Bernard's unsupported averment that Von Zuckerstein was not qualified. Bernard has no qualifications in district heating (engineering, economics, finance or law), and Bernard admitted that he never supervised Von Zuckerstein's work, having been transferred into Von Zuckerstein's area at the time of Von

Zuckerstein's layoff. Trial court held that Von Zuckerstein was qualified for some of the 50 positions, but that his letters complaining of discrimination "poisoned the well" and justified employer's refusal to rehire.

The appellate court held that Jain failed to identify the specific job descriptions and qualifications for the two positions he sought after being laid off. Evidence shows that Jain applied for two jobs in system modelling and analysis, and one job as a mechanical engineer. Undisputed evidence shows that Jain worked as a modeler and an analyst for a year and a half at Argonne before his layoff, and further that he holds a doctorate in mechanical engineering. Argonne produced no evidence that Jain was not qualified for the three positions. Jain was not rehired.

The appellate court held that both Argonne supervisors denied the statement that Jain cannot be manager because "the sponsor does not want an Indian *in charge* of the program." The evidence totally contradicts the court's ruling. Sather testified that he does not recollect one way or the other, and Bernard denied that an entirely different statement was made, namely that "the sponsor did not like Indians *working* on a project." The focus of this litigation is that non-whites and immigrants were barred from becoming supervisors, not that they could not be workers.

The appellate court held that Von Zuckerstein was denied promotion to a full scientist because of lack of publications and his inability to work independently. Evidence showed that Von Zuckerstein was assigned to work in another division (Engineering Division "ENG") and both his EES supervisors Meshenberg and Bernard admitted to having had no supervision and no knowledge of his work. Von Zuckerstein's supervisors in Engineering Division (Pascual, Kuczen and Matousek) rated Von Zuckerstein's performance "excellent", "one you can rely on" and "outstand-

ing", respectively. The inability to work independently contention clearly is pretextual. Evidence shows that Von Zuckerstein worked independently without any supervision in another division (Engineering Division).

Evidence showed further that Von Zuckerstein's position description did not require publications, and that the U.S. Government directed that federal funds for district heating activities at Argonne must not be spent on publications. Argonne promotion guidelines provide that in applied science, publications may not be possible, and that in such case the scientist's work must be documented for the promotion. The U.S. Government recognized the extraordinary significance of Von Zuckerstein's work results when it organized a public exhibit of Von Zuckerstein's work. Argonne did not produce any evidence that the work of any promoted employees in EES was similarly honored.

Argonne manual indicates that the promotion to full scientist is routine and most employees get it. The lack of publications contentions are clearly pretextual because publications were not a part of Von Zuckerstein's duties at Argonne.

The appellate court held that Ramaswami was transferred out of his field of expertise because of a decrease in demand for Ramaswami's skills. The evidence shows that the demand has grown and that additional employees were brought in at the time of Ramaswami's transfer to handle the greater workload (Schlenger, Chuang, Wang).

The appellate court held that EES made adverse decisions about petitioners because of lack of funding, funding cuts, etc. Uncontradicted evidence showed that EES Division and the specific groups in which petitioners worked experienced dramatic growth in funding and employment at the time of petitioners' layoffs. For instance, the evi-

dence showed that the petitioners' work groups added 55 new employees in the relevant period from February of 1983 to November of 1984. The court adopted Argonne's unsupported statement about the funding cuts, and gave no weight to Argonne documents showing long lists of new employees and explosive growth in funding in the very groups that laid petitioners off.

The appellate court held that the only system application economist retained after Von Zuckerstein's layoff was foreign born (Teotia). Undisputed evidence showed that 6 months after said layoff, all systems application economists except Von Zuckerstein continued working at Argonne (Poyer, Suchy). The evidence clearly showed respondent's mastery at producing self-serving documents, purporting one thing, while Argonne did exactly the opposite.

The appellate court held that the reason for Jain's removal as principal investigator of the industrial cogeneration project was extreme delays in the project. Undisputed evidence showed that Argonne took no action against Jain's co-principal investigator Faddis, who was jointly responsible for the project. Faddis is white, native born. Jain was replaced by Mr. Lazar, who is white, native born, and does not have a doctorate like Jain. Evidence showed that the project caught fire under Lazar's direction, causing an extensive delay. Argonne took no action against Lazar but laid off Jain. Undisputed evidence shows further that the delays Argonne now claims were the reason for Jain's demotion occurred after said demotion, and that the delays were caused by a white employee Thomas. Thomas was appointed into the project by director Sather over Jain's strong objection. The delays occurred because Jain was removed from charge of the project, and was replaced by less qualified, white, native born employees at the direction of director Sather.

The appellate court held that racially motivated retaliation because employees attempted to enforce their contract rights is not a claim cognizable under 42 USC §1981. Freedom from discrimination was petitioners' contract right set forth in Argonne manual under the heading of mutual obligations of Argonne and employees. Refusal to rehire Von Zuckerstein because he is suing Argonne, pulling back Ramaswami's layoff extension because he took steps to enforce his contract right to non-discriminatory work environment, and the denial of in-house grievance procedures, are among the examples of retaliation on the basis of race and ethnicity.

There is no evidence that Argonne disapproved of the discriminatory actions of Argonne supervisors, or that it disciplined or sanctioned them in any way. To the contrary, Argonne promoted Sather first to deputy division director and then to division director. Argonne also refused petitioners their contract right to have their discrimination grievances quickly investigated, aired and resolved in the in-house grievance procedures. The fact that Argonne's professed justifications for its actions were all shown to be pretextual indicates Argonne's intent to continue its discriminatory practices, and to condone and ratify discriminatory actions by Argonne supervisors.

CIVIL RIGHTS ACT OF 1991 APPLIES TO PETITIONERS' CLAIMS

The Civil Rights Act of 1991 provides that petitioners can recover their costs if they produce evidence of motivation by an unpermitted factor. This is so even if petitioners do not prevail on their claims. The Act became effective on November 21, 1991. On January 29, 1993, the appellate court awarded costs to the respondent instead of the petitioners. Petitioners produced ample direct evidence of unlawful discrimination and racial motivation as shown above.

BASIS OF JURISDICTION IN THE TRIAL COURT

Jurisdiction of the trial court was invoked pursuant to Title VII of the Civil Rights Act of 1964 42 USC §2000 et seq. and the Civil Rights Act of 1866, 42 USC §1981. The court has jurisdiction pursuant to 42 USC §2000e-5(f)(3) and 28 USC §§1331, 1343, 2201 and 2202.

REASONS FOR GRANTING THE WRIT

It is beyond question that petitioners were discriminated against on the basis of race. The appellate court held that Argonne supervisors were motivated by racial animus. However, the court applied entirely different rules of law to deny petitioners' claims in conflict with decisions of the Supreme Court, in conflict with decisions of the other courts of appeals, and in conflict with its own precedents.

A.

PRIVATE EMPLOYERS ARE LIABLE FOR DISCRIMINATORY CONDUCT OF THEIR SUPERVISORS.

The appellate court held that it is not sufficient for the Immigrant Americans here to show by direct evidence that Argonne supervisors were motivated by racial and ethnic considerations when making adverse decisions about petitioners. The court held that petitioners must show discriminatory intent on the part of Argonne, separate and apart from the discriminatory intent of Argonne directors. The ruling is in conflict with decisions in the other circuits, and with the prior decisions in the 7th Circuit.

In *Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77, 80 (3rd Cir. 1983) the court held that it is widely recognized in racial discrimination cases that an employer is liable as a principal for discriminatory actions of supervisors. Apparent authority to act as supervisor is sufficient for employer's

liability. *Gay v. Board of Trustees of San Jacinto College*, 608 F.2d 127, 128 (5th Cir. 1979). Even if upper management record on race relations is exemplary, employer is nevertheless liable for discriminatory decisions of lower level supervisors. *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972). An employer is held liable for the discriminatory actions of its supervisors which affect the tangible job benefits of an employee on the basis of race, religion or national origin. *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).

The ruling is also in conflict with prior decisions of the 7th Circuit Court of Appeals. In *Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985) the court acknowledged that the courts have universally applied the rule that employers are strictly liable for the discriminatory conduct of their supervisory personnel. See also *Flowers v. Crouch Walker Corp.* 552 F.2d 1277, 1282 (7th Cir. 1977).

The employer's liability is reinforced by the fact that Argonne took no remedial action upon notice of the discriminatory conduct of its supervisors. Quite the contrary. Evidence shows that Argonne denied petitioners their contract right to have their discrimination complaints "thoroughly investigated, aired and resolved within the laboratory with the counseling and attendance by affirmative action representative." Undisputed evidence shows that Argonne did not collect any data to commence investigation of petitioners' complaint that people like them are excluded from management, and affirmative action director testified that her office did nothing in response to petitioners' race discrimination complaints.

Like other private entities, universities, consultants and the like, Argonne receives federal money under contract with the U.S. Government to cover a part of its operations. Said contract imposes affirmative obligation to

remedy discriminatory problems for the benefit of the employees. The evidence shows that Argonne did not do anything to remedy the discriminatory actions of its supervisors after it received notice thereof.

In holding that Argonne is not responsible for direct evidence of racial animus of its supervisors, and by excluding said direct evidence from review of lower court ruling granting Argonne's motion for directed jury verdict, the appellate court denied petitioners their 14th Amendment right of due process and equal protection of laws, and the 7th Amendment right of a jury trial.

B.

MC DONNELL DOUGLAS ANALYSIS IS INAPPLICABLE AFTER PETITIONERS PRODUCED DIRECT EVIDENCE OF RACIAL ANIMUS.

The appellate court held that even though petitioners showed by direct evidence that their supervisors were motivated by racial animus, their claims should be analyzed using the indirect evidence, burden-shifting method under *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The court then eliminated all direct evidence of racial animus from the *McDonnell* analysis of jury issues.

In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 83 L.Ed.2d 523, 533 (1985) the Supreme Court decided that the *McDonnell Douglas* test is inapplicable where the petitioner presents direct evidence of discrimination. Other courts of appeals have uniformly applied this standard. *Bibbs v. Block*, 778 F.2d 1318, 1324 (8th Cir. 1985), *Blalock v. Metal Trades*, 775 F.2d 703, 711 (6th Cir. 1985), *Miles v. MNC Corp.*, 750 F.2d 867, 875 (11th Cir. 1985). The burden of proof immediately shifts to the employer. *Fields v. Clark University*, 817 F.2d 931, 937 (1st Cir. 1987).

Direct evidence is evidence that "shows that the impermissible criterion played some part in the decision-making process." *Tyler v. Bethlehem Steel Corp.* 958 F.2d 1176, 1183 (2nd Cir. 1992) Cert. Den.

The burden of proof shifts to the employer even if no direct evidence is present, if petitioners produce circumstantial evidence tied directly to the alleged discriminatory animus. *Kirschner v. Office of the Comptroller of New York*, 973 F.2d 88, at 93 (2nd Cir. 1992).

Petitioners here have shown by direct evidence that Argonne's decisions to deny them supervisory positions, to refuse to rehire them, to deny them their contract rights to grievance procedures, to demote them and to lay them off were motivated by racial, ethnicity, and retaliatory animus. The appellate court use of the *McDonnell Douglas* analysis to their claims therefore was error. Excluding the direct evidence from analysis of the jury issues also was error.

In 1989, the Supreme Court further clarified the standard for mixed motive cases, (cases in which decisions were made for discriminatory reasons as well as for legitimate non-discriminatory reasons) in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 252, 104 L.Ed.2d 268, 109 S.Ct. 1775. The Court held that in the event petitioners show that the employer was motivated by an impermissible factor in making a decision, the employer can still prevail by proving as an affirmative defense, that its legitimate reasons, standing alone, would have induced it to make the same decision.

The courts of appeals have consistently applied the *Price Waterhouse* standard in *Ostrowski v. Atlantic Mut. Ins. Companies*, 968 F.2d 171, 180 (2nd Cir. 1992), *Simpson v. Diversitech General, Inc.*, 945 F.2d 156, 159 (6th Cir. 1991), *Kirschner v. Office of the Comptroller of N.Y.*, 973 F.2d 88, 93 (2nd Cir. 1992), *Tyler v. Bethlehem Steel Corp.*, (2nd 1992) 958 F.2d 1176, 1181, Cert. Den.

Once petitioners showed that Argonne supervisors were motivated by race, ethnicity and retaliatory animus in their decisions, the burden shifted to Argonne. Argonne did not meet this burden. Evidence showed that denying Ramaswami promotion on the grounds of lack of qualifications was pretextual because Ramaswami was better qualified than all whites, who were promoted. Evidence showed further that denying Jain promotion and demoting him because of delays was pretextual, because Argonne did not take any actions against whites Faddis, Lazar and Thomas for identical delays. Evidence also showed that Von Zuckerstein was not rehired for any of the 50 positions solely for retaliatory reasons. Bernard's contentions that Von Zuckerstein was not qualified were pretextual because Bernard admitted that he never supervised any of Von Zuckerstein's work, and because Bernard lacked relevant education and experience to be able to make an objective judgment of Von Zuckerstein's qualifications for said positions. Evidence clearly showed that lack of funding was a pretext to lay off petitioners after they sought supervisory positions, and that Argonne current justifications did not motivate it at the time adverse decisions about petitioners were made (e.g. delays occurring after Jain was demoted, complex layoff selection process was put in motion only after the decision was made to lay off Von Zuckerstein because director Kuczen asked that Von Zuckerstein be put in charge of the district heating program).

The employer may not prevail in a mixed motive case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. *Price Waterhouse v. Hopkins*, at 252.

The fact that Argonne supervisors made no effort to offer constructive criticism of Jain's deficiencies before demoting him provides circumstantial evidence of race discrimination. *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1146 (5th Cir. 1991).

On the basis of direct and circumstantial evidence of race, ethnicity and retaliatory discrimination against petitioners, a reasonable jury could find in favor of petitioners on Section 1981 claims.

Appellate court denial to petitioners of standards for direct evidence of racial animus under *TWA v. Thurston*, above, and the standards for mixed motive cases under *Price Waterhouse v. Hopkins*, denied petitioners their 14th Amendment right to due process and equal protection of laws, and the 7th Amendment right to trial by jury.

C.

ARGONNE MAY NOT DENY EMPLOYEES THEIR CONTRACT RIGHT TO IN-HOUSE GRIEVANCE PROCEDURES BECAUSE EMPLOYEES FILED EEOC CHARGES.

The appellate court held that Argonne properly denied Ramaswami his contract right to a grievance procedure because Ramaswami filed an EEOC charge. Without any supporting evidence therefor, the court held that Argonne's participation in the EEOC proceedings was equivalent to all the thorough investigation, airing and resolving steps Argonne was contractually required to do under the in-house grievance procedures.

The appellate court ruling is in conflict with the Supreme Court decision, and further it is in conflict with its own precedent.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974), the Supreme Court observed that Congress intended to provide parallel and overlapping remedies against discrimination and specifically stated that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a col-

lective bargaining agreement and his cause of action under Title VII".

Decision of the appellate court denied petitioners the parallel and overlapping remedies to discrimination intended by Congress.

Petitioners had a contract right to the grievance procedures and the procedures were provided as an employee benefit. In *EEOC v. Cosmair*, 821 F.2d 1085, 1089 (5th Cir. 1987) the court held that if the employer stopped providing the employee benefits to which he was otherwise entitled simply because he filed a charge, the company would be guilty of retaliation. In *EEOC v. Board of Governors of State Colleges*, 957 F.2d 424, 431 (7th Cir. 1992), Cert. Den. 121 L.Ed.2d 223, the court held that denial of in-house grievance procedures because employees file EEOC charges is discriminatory on its face, and that employees are protected by statutory provisions against retaliation and can file EEOC charges without any adverse employment consequences.

Denial of the grievance procedures to petitioners was discriminatory per se, and in violation of Title VII prohibition on retaliation 42 USC §2000e-3(a).

The decision of the appellate court here runs counter to public policy and discourages voluntary compliance by employers with the employment discrimination laws. Allowing employers to deny employees in-house grievance procedures because employees file EEOC charges would (1) discourage private resolution of discrimination complaints between the employer and employee, (2) shift the entire burden from private employers to the EEOC and the courts, (3) discourage voluntary EEO compliance by employers, (4) cause years of delays in resolution of discrimination complaints, (5) cause greater government involvement and increased costs to the taxpayer, (6) deny employees their contract right to the grievance procedure,

(7) result in less effective EEO enforcement because pertinent data, statistics and evidence from the grievance procedures are never generated, (8) constitute unlawful retaliation under Title VII of the Civil Rights Act of 1964. There are no benefits that would offset the disadvantages.

Denial of the grievance procedures by Argonne constitutes direct evidence of discriminatory intent on the part of Argonne, separate and apart from the direct evidence of discrimination by Argonne supervisors. Appellate court holding that there is no evidence of discriminatory intent on the part of Argonne is therefore in error.

The appellate court also held that Jain and Von Zuckerstein lost their contract right to the discrimination grievance procedure by making unrelated complaints in Argonne "Equity Review". Undisputed evidence showed that the grievance procedure was denied to Jain and Von Zuckerstein because they filed EEOC charges. The court ruling is error. Petitioners should not be denied in-house discrimination complaint procedure because Argonne conducted a review of complaints unrelated to discrimination in another procedure called "Equity Review".

The ruling denied petitioners their 14th Amendment equal protection of the law and due process of law rights, as well as their right to have the issues decided by the jury.

D.

PETITIONERS' PROMOTIONS FROM WORKER TO SUPERVISOR MEET THE "NEW AND DISTINCT RELATIONSHIP" TEST UNDER *PATTERSON*.

The appellate court held that Vresk's and Ramaswami's promotions from a worker to a supervisor (project manager and senior engineer) do not meet the "new and distinct relationship" test under *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363 (1989). The decision

of the appellate court is in conflict with the decisions of other courts of appeals, and with the prior decisions in the 7th Circuit Court of Appeals.

Other courts of appeals held consistently that promotion from non-management position to management position meets the "new and distinct relationship" test under *Patterson. Sitgraves v. Allied Signal, Inc.*, 953 F.2d 570, 573 (9th Cir. 1992), *Wall v. Trust Co.*, 946 F.2d 805, 808 (11th Cir. 1991), *Harrison v. Associates Corp. of North America*, 917 F.2d 195, 198 (5th Cir. 1990), *Mallory v. Booth Refrigeration Supply Co. Inc.*, 882 F.2d 908, 910 (4th Cir. 1989). The 7th Circuit reached the same conclusion in *Taylor v. Western and Southern Life Insurance Co.*, 966 F.2d 1188 (7th Cir. 1992).

Evidence is undisputed that each petitioner was denied promotion into supervisory position from a non-supervisory position.

The court held that because some projects in the project management group were temporary, the exclusion of Vresk from the project management group does not meet the *Patterson* test. While it is true that some projects did end, new projects came in and replaced them. Even though the projects themselves were temporary, the supervisory duties of employees in the project management group were permanent. Vresk complained that he was denied promotion into the work management group to manage successive projects like native born employees in the project management group.

In holding that petitioners' promotions from non-management to management positions do not meet the "new and distinct relationship" test, the court denied petitioners their 14th Amendment right to equal protection of laws and due process, and the 7th Amendment right to have promotion issues decided by jury.

The Supreme Court agreed to review the issue whether the Civil Rights Act of 1991 applies to pending cases. The ruling would impact petitioners here, since it may make all *Patterson* issues moot. In that case petitioners are likely to prevail because the promotions in each case were given to a less qualified, native born employee (Vachta, Bartusek, Schertz, Lazar and Kennedy).

Supreme Court ruling that the Civil Rights Act of 1991 does apply to pending cases would remove *Patterson* constraints, and petitioners' demotion, layoff and retaliation claims would be Section 1981 claims to be decided by jury, not the court. For instance, the jury would decide Jain's demotion claim on the basis of undisputed evidence that in 1983, Sather and Bernard decided to demote Jain because "the sponsor did not want an Indian in charge of the program". Petitioners were denied their 7th Amendment right to a jury on their demotion, layoff and retaliation claims when these claims were decided by the court.

E.

IN REVIEW OF MOTION FOR DIRECTED JURY VERDICT, NON MOVANT'S EVIDENCE IS TO BE BELIEVED, INFERENCES OF FACT SHOULD BE DRAWN IN NONMOVANT'S FAVOR, AND CREDIBILITY AND WEIGHT OF THE EVIDENCE ISSUES SHOULD BE RESOLVED IN NONMOVANT'S FAVOR.

In review of Argonne's motion for directed jury verdict, the appellate court accepted Argonne's version of the facts, eliminated from consideration petitioners' direct evidence of discrimination, drew inferences in favor of Argonne, questioned the credibility of petitioners' evidence, and rejected petitioners' version of the facts.

For instance, the court questioned whether Von Zuckerstein really applied for 50 open positions at Argonne, even though undisputed evidence showed that he did apply, and

the 50 positions were admitted by Argonne attorney in the trial transcript.

The appellate court procedures for reviewing the motion for directed jury verdict are in conflict with the Supreme Court rulings and with the decisions of other courts of appeals.

The Supreme Court ruled that "evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor". *Lytle v. Household Manufacturing*, 494 U.S. 545, at 554 and 555, 108 L.Ed.2d 504, 110 S.Ct. 1331 (1990). In *Masson v. New Yorker Magazine, Inc.*, 115 L.Ed.2d 447, 475 (1991), the Supreme Court held further that questions of credibility and of the weight to be accorded particular evidence must also be resolved in nonmovant's favor.

Other courts of appeal have reached similar results. *Opryland USA v. Great American Music Show*, 970 F.2d 847 (Fed. Cir. 1992), *Tipton v. Bergrohr GmbH*, 965 F.2d 994 (11th Cir. 1992), *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991), *Stever v. Independent School Dist.*, 943 F.2d 854 (8th Cir. 1991), *Mitchell v. Rice*, 954 F.2d 187 (4th Cir. 1992), *Bayer v. U.S. Dept. of the Treasury*, 956 F.2d 330 (D.C. Cir. 1992), *AFA Tours Inc. v. Whitchurch*, 937 F.2d 82 (2nd Cir. 1991), *International Shortstop Inc. v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir. 1991). By disbelieving nonmovants' evidence and drawing inferences in favor of movant in analysis of the motion for directed verdict, the appellate court denied petitioners their 7th Amendment right to have the case heard and decided by the jury, and further their 14th Amendment right of equal protection of the laws and due process.

F.

RACIALLY MOTIVATED RETALIATION BECAUSE EMPLOYEES ATTEMPTED TO ENFORCE THEIR CONTRACT RIGHTS IS A VALID §1981 CLAIM.

The appellate court held that petitioners' retaliation claims are not Section 1981 claims. The decision is in conflict with decisions in the other courts of appeals, and further it is in conflict with the 7th Circuit precedents.

In *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 494 (6th Cir. 1992) the court held that racially motivated retaliation because employees were enforcing their contract right is a Section 1981 claim. See also *Carter v. South Central Bell*, 912 F.2d 832 (5th Cir. 1990).

Here, petitioners were in the process of enforcing their contract right to a non-discriminatory work environment, and their contract right to an in-house grievance procedure. The contract rights were set forth under mutual obligations of Argonne and employees, in the Argonne personnel manual. The causal link is established by direct and circumstantial evidence as *inter alia*, director Bernard stated that Von Zuckerstein will not be rehired because he is suing Argonne for discrimination. The appellate court acknowledged that Argonne supervisors were motivated by racial animus. The petitioners' evidence thus meets all of the elements of a valid Section 1981 retaliation claim.

The 7th Circuit Court of Appeals recognized retaliation as a Section 1981 claim in *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990) cert. den. 111 S.Ct. 1306 (1991) and in *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1052 (7th Cir. 1991).

By holding that retaliation is not a Section 1981 claim, the appellate court applied different rules of law to petitioners' claims, and thus denied them their 14th Amendment right to equal protection of the laws and due proc-

ess, and their 7th Amendment right to have the jury hear and decide their Section 1981 retaliation claims.

G.

THE CIVIL RIGHTS ACT OF 1991 APPLIES TO PENDING CASES, AND PETITIONERS THEREFORE SHOULD RECOVER DAMAGES, COSTS AND ATTORNEY FEES AFTER PROVING THAT ARGONNE AND ITS SUPERVISORS WERE MOTIVATED BY RACIAL ANIMUS IN DECISIONS AGAINST PETITIONERS.

The appellate court awarded Argonne its costs on appeal even though undisputed evidence showed that Argonne supervisors were motivated by racial animus when making adverse decisions about petitioners, and that Argonne as an institution retaliated against petitioners because they filed EEOC charges.

The appellate court awarded Argonne costs on appeal on January 29, 1993, after the Civil Rights Act became effective on November 21, 1991. This is in conflict with the provisions of the Civil Rights Act of 1991, 42 U.S.C. §2000e-5(g)(2)(B), and the decision of another court of appeal. *Estate of Reynolds v. Martin*, 985 F.2d 470, 476 (9th Cir. 1993).

In *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2nd Cir. 1992), the court held that even if the employer proves its *Price Waterhouse* affirmative defense, the court may still grant costs and attorney fees. Here, Argonne did not prove its *Price Waterhouse* defense and petitioners are therefore entitled to receive damages, reinstatement, costs and attorney fees in conformance with the provisions of the Civil Rights Act of 1991.

By awarding Argonne its costs on appeal, appellate court denied petitioners their 14th Amendment right to equal protection of laws and due process.

The trial court awarded Argonne $30,000 in costs at the trial level. Petitioners should not pay the substantial sum compounded by costs on appeal after they produced undisputed direct evidence of discrimination and retaliation by Argonne and Argonne supervisors.

The Supreme Court agreed to review the issue whether the Civil Rights Act of 1991 applies to pending cases. The ruling should be applied to petitioners' Title VII and Section 1981 claims for damages, reinstatement, costs, attorney fees and other relief the Court deems appropriate.

H.

DISMISSAL OF TITLE VII CLAIMS WAS AGAINST THE WEIGHT OF EVIDENCE, AND IMPROPER BEFORE JURY VERDICT ON §1981 CLAIMS.

The appellate court held that dismissal of petitioners' Title VII claims was proper. In view of the ample direct evidence of discrimination produced by petitioners, the ruling is against the manifest weight of the evidence.

Should directing the jury verdict be incorrect, dismissal of the Title VII claims is improper because it would deny petitioners the right to have identical claims decided by jury as Section 1981 claims. *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 355-57 (7th Cir. 1987).

CONCLUSION

Appellate court massive departures from the well-established rules of law in this case indicate the need that the standards for review of claims of discrimination against the 20 million Immigrant Americans in the U.S. should be settled by the Supreme Court.

Petitioners respectfully request a Court finding that the phrase "All men are created equal" applies equally to Immigrant Americans under the law.

For all of the foregoing reasons, Petitioners respectfully request that this Court grant a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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